

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WELDON LEE MOSBY,

Defendant-Appellant.

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UNPUBLISHED

August 20, 2002

No. 230664

Montcalm Circuit Court

LC No. 00-000018-FC

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant Weldon Lee Mosby appeals as of right his jury trial conviction of first-degree murder, MCL 750.316, and conspiracy to commit murder, MCL 750.157a(a) and MCL 750.316. Defendant was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and forty to sixty years' imprisonment for the conspiracy to commit murder conviction. We affirm.

Defendant contends that the trial court improperly denied his pretrial motion for a change of venue. Specifically, defendant contends that a change of venue was necessary because: (i) he was prejudiced by the extensive and inflammatory publicity regarding the crime during the months preceding the trial; and (ii) he was "an African American male charged with killing a white man in a substantially all white community."

Ordinarily, a defendant "must be tried in the county where the crime is committed." *People v Jendrzewski*, 455 Mich 495, 499; 566 NW2d 530 (1997), citing MCL 600.8312. However, "in special circumstances where justice demands or statute provides," a trial court may order a change of venue to another county. *Id.* at 500. Our Supreme Court described the following two "approaches" for determining whether the trial court abused its discretion in denying a motion to change venue because of concern regarding the defendant's ability to receive a fair trial:

Community prejudice amounting to an actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice. [*Id.* at 500-501.]

To determine if a defendant's trial was fundamentally fair, the court must look at the totality of the circumstances, including whether media coverage remained "largely factual" or became "invidious or inflammatory." *Id.* at 502, 504, quoting *Murphy v Florida*, 421 US 794, 799-800; 95 S Ct 2031; 44 L Ed 2d 589 (1975). In addition to examining the pretrial publicity, the entire voir dire must also be examined to determine if an impartial jury was impaneled. *Jendrzewski, supra* at 517.

Generally, we review a trial court's decision to grant or deny a change of venue for an abuse of discretion. *Jendrzewski, supra* at 500, quoting *People v Swift*, 172 Mich 473, 480; 138 NW 662 (1912). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

In this case, thirty-seven jurors were questioned during voir dire. Twenty-two of the thirty-seven jurors stated they had read, heard, or discussed this case in some way, and only two expressed any concern about being prejudiced because of the pretrial publicity. In light of the very low percentage of potential jurors who indicated a possible prejudice, we are not persuaded that defendant has demonstrated a "community bias" based on "a high percentage of the venire who admit to a disqualifying prejudice." See *Jendrzewski, supra* at 500-501. Similarly, it does not appear that the jury pool had been tainted. See *id.* Moreover, given the slight majority of jurors who were at all familiar with the case based on pretrial publicity, it does not appear that the community had been "saturated" by the pretrial publicity. *Id.* Finally, after reviewing the newspaper articles, we do not believe that they could properly be construed as "highly inflammatory"; rather, the articles presented the matter in a largely fair and accurate manner. *Id.* Consequently, we conclude that the trial court did not abuse its discretion by denying defendant's motion for a change of venue based on the pretrial publicity.

In addition, we reject defendant's contention that the trial court abused its discretion by denying defendant's motion for a change of venue based on the racial composition of his jury. In *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000), we explained:

To determine whether a prima facie violation of the fair-cross-section requirement of US Const, Am VI has occurred, the court must find the following: (1) the group alleged to be excluded must be a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury-selection process.

It is well established, however, that "systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *Id.* at 526.

Here, defendant makes no argument regarding the under-representation of African-Americans in the jury pool, as compared to the community, nor does he assert that there was a systematic exclusion of African-Americans from the jury-selection process. Instead, the

gravamen of defendant's contention is that the trial court should have granted his motion for a change of venue so that he could be tried in a community that did not have a disproportionately low number of African-Americans. However, defendant offers no evidence suggesting that the racial composition of Montcalm County deviated from statistical norms. Although the impaneled jury did not contain any African-Americans, it does not necessarily follow that this was based on the composition of the community. Indeed, our requirement that a defendant challenging the racial composition of the jury pool must also show a systematic exclusion suggests that a particular jury venire may not always reflect the composition of the community through no fault of the jury pool selection system. See *Williams, supra* at 525-526. Further, our requirement that a defendant show that more than one or two jury pools were under-represented also suggests that anomalies may occur.

Moreover, defendant cites no authority indicating that the trial court was required, or even authorized, to change venue merely to increase the statistical likelihood of defendant being tried before a jury that included one or more African-Americans. In fact, imposing such a requirement would undoubtedly place an undue burden on the administration of justice. Ultimately, each of the jurors selected for defendant's petit jury indicated that he or she would decide defendant's case impartially; conversely, each of the few potential jurors who expressed any concern about their ability to be impartial were excused. Accordingly, we again conclude that the trial court did not abuse its discretion by denying defendant's motion for a change of venue.

Defendant also contends that the trial court erred in determining that defendant's statements to the police were voluntary. Specifically, defendant contends that his confession was involuntary because the police delayed questioning and purportedly used defendant's wife, a court reporter, to coax his confession.

Generally, "statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). In determining whether a statement was voluntary, the following factors should be considered:

[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect [sic] was threatened with abuse. [*Id.* at 417-418.]

Although we review de novo a trial court's determination that a statement was voluntary, we "will not reverse the trial court's findings unless they are clearly erroneous." *Id.* at 417.

Here, defendant was a formally educated, thirty-nine-year-old parolee who was repeatedly given *Miranda*<sup>1</sup> warnings, which he waived in writing. Questioning was not repeated or prolonged, and defendant is not contending that he was physically abused or threatened. In fact, defendant indicated within the confession that he “wasn’t conjured, coached, or none of that . . . I’m level headed, not drunk, high, or hurt.” Although defendant was not questioned until about 19 1/2 hours after he was arrested, he was arrested on a separate matter—a parole violation. Moreover, the record indicates that defendant spent most of the time during the delay sleeping in his cell, reducing concerns that his anxiety was overwhelming or that the delay was used to wear down defendant’s resistance. Thus, there is no indication that the police used the delay to extract the confession. Further, there is no credible evidence that defendant’s wife acted on behalf of police officers to compel defendant to give a statement. In fact, it was defendant who requested to speak with her. Accordingly, there was ample evidence supporting the trial court’s determination that defendant’s confession was voluntary as a matter of law. Therefore, we conclude that the trial court did not err by denying defendant’s motion to suppress his confession.

Defendant also contends that there was insufficient evidence to bind him over for trial. We review de novo a circuit court’s denial of a defendant’s motion to quash to determine if the district court abused its discretion in deciding that there was probable cause to believe that the defendant committed the offense charged. *People v Reigle*, 223 Mich App 34, 36-37; 566 NW2d 21 (1997).

During defendant’s preliminary examination, the victim’s wife testified that she and defendant talked about killing the victim, and had unsuccessfully tried to kill the victim during the week before his murder. Further, she testified that she paid money to defendant to kill the victim. Thus, there was evidence establishing a conspiracy to murder the victim. In addition, defendant’s friend, who went with him to the victim’s house the night of the murder, testified that he heard a physical assault and that defendant told him he had beaten the victim. While the district court noted that there were questions of fact about whether defendant’s friend really knew nothing else about the murder, the district court did not in any way question the veracity of the friend’s testimony regarding defendant’s involvement. As such, there was also a sufficient factual basis to support the murder charges. In light of the evidence introduced at the preliminary examination supporting both charges, we do not believe that the district court’s decision to bind over defendant on the charges was an abuse of discretion; therefore, the trial court did not err in denying defendant’s motion to quash the information.

Defendant also contends that the trial court erred in admitting DNA lab reports indicating that there was human blood on the ax and that it was the victim’s blood. Specifically, defendant contends that the admission of the evidence was an unfair surprise and highly prejudicial because the prosecutor did not provide defendant copies of the lab reports in a timely fashion. The trial court denied a defense motion to exclude the evidence, finding that there was a reference to the blood on the ax during the preliminary examination. The trial court opined that the preliminary examination testimony prevented a conclusion that there was undue surprise.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

We review a trial court's decisions regarding both the admission of evidence and a determination of an appropriate remedy for a discovery violation for an abuse of that discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). Here, we agree with the trial court's ruling that the lab reports did not present an undue surprise. The trial court correctly noted that there was preliminary examination testimony indicating that there appeared to be blood on the ax that was recovered in the victim's driveway. In light of the victim's wounds and the location of the ax, it is not surprising that the blood on the ax was determined to be human blood or that DNA lab testing indicated that it was the victim's blood. In addition, to the extent that the lab reports connected the ax to the victim, instead of connecting defendant to the ax, they were less prejudicial. In other words, the prosecutor was still required to introduce evidence linking defendant to the ax in order to obtain a conviction. Accordingly, we do not believe that the trial court abused its discretion by denying defendant's motion to exclude the evidence.

Finally, defendant contends that he was deprived of his constitutional right to effective assistance of counsel. A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider, supra* at 423-424. Where, as here, a defendant fails to request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *Id.* at 423.

Specifically, defendant contends that trial counsel erred by "opening the door" for the prosecutor to argue that the "remaining two co-defendants had invoked their Fifth Amendment privilege."<sup>2</sup> We are not persuaded, however, that trial counsel's tactics were "deficient." *Snider, supra* at 423-424. Although defense counsel's argument may have "invited" the prosecutor to explain the absence of these witnesses, it does not necessarily follow that the jury looked favorably on the prosecutor's explanation. Moreover, it is certainly customary for trial counsel to question the absence of potential witnesses. Further, in light of the overwhelming evidence of defendant's guilt, we do not believe that there is a reasonable likelihood that defendant would not have been convicted in the absence of either trial counsel's argument or the prosecutor's explanation. *Id.* Consequently, we conclude that defendant was not deprived of his constitutional right to effective assistance of counsel.

Affirmed.

/s/ Janet T. Neff  
/s/ Helene N. White  
/s/ Donald S. Owens

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<sup>2</sup> We question defendant's reference to the two potential witnesses as "co-defendants." Only one of the witnesses was charged, and that witness was not charged until the eve of defendant's trial. Moreover, we note that the prosecutor merely argued that she had an ethical obligation not to attempt to present the testimony of witness that she believed were "going to invoke" their Fifth Amendment rights. Thus, contrary to defendant's assertion, the jury was not informed that the two "co-defendants" *invoked* their right to remain silent.